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July 25, 1996

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EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RE: Interconnection Between Local Exchange Carriers and Commercial
Mobile Radio Service Providers (CC Docket No. 95-185)
Commission Initiates Proceeding to Implement Interconnection Provisions
of Telecommunications Act of 1996 (CC Docket No. 96-98) /

Dear Mr. Caton:

The attached material was distributed to Lauren Belvin, Senior Advisor to Commissioner Quello, James Casserly, Jackie Chorney, John Nakahata and Suzanne Toller. Please associate this material with the above-referenced proceeding.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4960 should you have any questions or require additional information concerning this matter.

Sincerely,

A handwritten signature in cursive script, reading "Kathleen Q. Abernathy".

Kathleen Q. Abernathy

Attachment

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July 24, 1996

Lauren "Pete" Belvin
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1919 M Street, N.W.
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JUL 25 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: LEC/CMRS Interconnection Issues
CC Docket No. 95-185 and CC Docket No. 96-98

Dear Pete:

In response to your request attached is proposed language the FCC could use in addressing the question of jurisdiction over LEC/CMRS interconnection negotiations, the need for CMRS interim relief and whether CMRS providers offer "telephone exchange service."

Please call if you have any questions after reviewing the attached material.

Sincerely,

A handwritten signature in cursive script, appearing to read "K. Abernathy".

Kathleen Q. Abernathy

Attachments

cc: James Casserly
Jackie Chorney
John Nakahata
Suzanne Toller

TELEPHONE EXCHANGE SERVICE

Our decision, explained in the following section, that Section 332 as amended by the 1993 Budget Act provides for exclusive FCC jurisdiction over LEC-CMRS interconnection rates, makes it unnecessary to decide whether certain CMRS carriers provide “telephone exchange service” or “exchange access” services as contemplated by Section 251(c)(2). However, we note that it does not appear that Congress generally intended to include CMRS as providers of such services since cellular, broadband PCS, and wide-area SMR licensees provide service to areas substantially beyond those “within a telephone exchange” or “of a character ordinarily furnished by a single exchange” (See Sections 3(47) and (16)). Not only did Congress decide not to explicitly include CMRS providers as the type of carriers considered to be providing telephone exchange services, but also Congress explicitly excluded wireless service providers in many relevant circumstances. See, e.g., Section 253(f) (specifically excluding CMRS providers from the imposition of certain obligations on those carriers that “seek[] to provide telephone exchange service” in rural areas); and Section 271(c)(1)(A) (excluding cellular carriers from being considered as providing telephone exchange services for purposes of BOC applications to provide in-region, interLATA services).

¹ If, in the future, a CMRS provider provides local loop or other wireless services that are found to be “a replacement of a substantial portion of the wireline telephone exchange service within” such State,” then we are authorized to classify such CMRS provider as a “local exchange carrier.” See Section 3(26) and H.R. Rep. No. 458, 104th Cong., 2d Sess. 115 (1996). We have not determined that any CMRS provider meets that test.

SUMMARY OF ARGUMENTS

Those arguing that the FCC has exclusive jurisdiction over LEC-CMRS interconnection issues rely upon three provisions amended by the 1993 Budget Act -- Section 332(c)(3), Section 2(b), and Section 332(c)(1)(B). First, Section 332(c)(3) ("State Preemption") provides that "[n]otwithstanding sections 2(b) . . . no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial services."

Second, Congress amended Section 2(b) to specifically exclude all of Section 332, stating that "Except as provided in . . . section 332 . . . , nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier" ¹

Third, parties argue that Section 332(c)(1)(B) gives the Commission exclusive jurisdiction over LEC-CMRS interconnection arrangements, including rates. They point out that Section 332(c)(1)(B) expanded the FCC's jurisdiction pursuant to Section 201 (which, inter alia, requires that interconnection rates be just and reasonable) in situations where there is "any" request for interconnection -- interstate or intrastate -- made by a CMRS provider.

¹ **Emphasis added.** See, e.g., AirTouch Reply Comments at 34-35 (noting that in the 1993 Budget Act Congress Section 2(b) to exclude all of Section 332, not just the state rate provisions of Section 332(c)(3). Of course, Section 332(c)(3) also has a specific provision that excludes the jurisdictional limitations of Section 2(b).

On the other hand, incumbent LECs and others argue that Sections 251 and 252 apply to all LEC-CMRS interconnection agreements. They basically make two arguments. First, they state that Section 332(c)(3) applies to only those rates charged by CMRS providers to their subscribers. Second, they argue that Section 332(c)(1)(B) does not specifically address the issue of interconnection rates and that the effect of that provision is limited by its very terms so that it “shall not be construed as a limitation or expansion of the Commission’s authority to order interconnection.” Finally, some LECs argue that a decision to exclude CMRS providers from the Section 251/252 process would be inconsistent with Congress’ decision to make interconnection agreements the subject of inter-carrier negotiations subject to state oversight.

DISCUSSION

We conclude that the relevant statutory provision for purposes of establishing jurisdiction over LEC-CMRS interconnection is Section 332(c)(1)(B).¹ This section provides:

Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

Under this Section the Commission is vested with the authority to order interconnection requested by any CMRS provider, and, in doing so, the Commission is expressly directed to rely on the provisions of Section 201. In turn, Section 201 requires carriers to furnish interconnection upon reasonable request, and at just and reasonable rates. The Commission's clearly assigned role under Section 332(c)(1)(B), then, is to ensure that all CMRS providers are able to obtain interconnection from LECs at reasonable costs.²

¹ Several commenters opposed to the Commission's exercise of preemption in this proceeding agree that this is the relevant statutory provision for purposes of LEC-CMRS interconnection. *See, e.g.*, Comments of BellSouth at 34 ("Congress addressed the issue of LEC-CMRS interconnection not in Section 332(c)(3) but in Section 332(c)(1)(B)"); Pacific Bell at 99 ("Interconnection between LECs and CMRS is covered by Section 332(c)(1)(B) not 332(c)(3)"); United States Telephone Ass'n at 17 ("USTA") ("Section 332(c)(1) [is] the most direct statement by Congress on interconnection in the 1993 Budget Act"), N.Y. Dept. of Pub. Service at 13-14.

² The Commission is therefore assigned the responsibility to ensure that the charges, practices, classifications, and regulations associated with LEC-CMRS interconnection are just and reasonable.

The second sentence of Section 332(c)(1)(B) provides that "[e]xcept to the extent that the Commission is required to respond to any CMRS provider's request for interconnection, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act." This sentence confirms that the Commission's authority under Section 201 is unchanged by Section 332(c)(1)(B) except where the Commission is dealing with interconnection requests by CMRS providers. In other words, the Budget Act expands the Commission's Section 201 jurisdiction, but only insofar as LEC-CMRS interconnection is involved. The Commission's jurisdiction with respect to non-CMRS telecommunications services is unaffected by Section 332(c)(1)(B).

The legislative history underlying the adoption of Section 332(c)(1)(B) further supports the conclusion that the Commission, rather than the states, was assigned the exclusive authority to oversee matters related to LEC-CMRS interconnection. Section 332(c)(1)(B) was adopted because:

“[t]he Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.”³

The Commission was thus charged with the responsibility to “promote” interconnection in order to further Congress' vision of national CMRS networks. Significantly, there is no mention of any state role or function in the achievement of these goals.

The 1993 Budget Act's Amendment to Section 2(b) further supports this conclusion. Prior to the adoption of the Budget Act in 1993, the Commission's

³ H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 260 (1993) (emphasis added).

jurisdiction under Section 201, with some exceptions, was limited to interstate services by virtue of Section 2(b) of the Act, which reserved to the states jurisdiction over intrastate services. The Budget Act revisions to Sections 2(b) and 332 of the Communications Act, however, eliminated the interstate/intrastate jurisdictional dichotomy with respect to CMRS. Specifically, Section 2(b) was amended to clarify that the reservation of state authority over intrastate services expressly did not extend to services covered by Section 332 -- namely, mobile services.⁴

As shown above, moreover, pursuant to Section 332(c)(1)(B), jurisdiction over LEC-CMRS interconnection was delegated exclusively to the Commission without regard to any interstate or intrastate components of the underlying CMRS services.

We conclude from the above that the Budget Act revisions to Sections 332 and 2(b) of the Communications Act, coupled with the amendment to Section 2(b), clearly delegated to the Commission exclusive jurisdiction over LEC-CMRS interconnection matters, both interstate and intrastate. The remaining question at issue, then, is whether Congress reversed its position less than three years later when it enacted the 1996 Act. On this point, we are persuaded that Congress intended to leave undisturbed the regulatory measures adopted in the Budget Act. In other words, having already established a comprehensive regulatory scheme to govern CMRS, Congress directed itself

⁴ Section 2(b), as amended, now reads: "Except as provided in ... Section 332 ... nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to ... intrastate communication service by wire or radio of any carrier."

to the remainder of the telecommunications industry with the regulatory changes adopted in the 1996 Act."⁵

Many commenters claim that Section 251 of the 1996 Act expressly preserves state authority over the terms and conditions of local interconnection arrangements, and that Section 252 authorizes the states to serve as arbitrators in interconnection disputes. While this may be true as a general proposition, this argument, in our view, does not satisfactorily resolve the principal question at hand -- that is, how to reconcile the power taken away from the states by the Budget Act with respect to CMRS interconnection, and the general interconnection authority given to the states in the 1996 Act. Among telecommunications services providers, Congress carved out a distinct regulatory scheme for CMRS in the Budget Act, removing even intrastate services -- including LEC-CMRS interconnection -- from the purview of state authority. In the Commission's view, Congress would have been quite explicit in the 1996 Act on the particular issue of LEC-

⁵ This point was underscored by Representative Fields when Congress commenced consideration of the legislation leading up to the 1996 Act:

"Last year we began the process of building a national telecommunications infrastructure when we adopted a regulatory framework for wireless services built on the same concepts contained in H.R. 3636. Today we will take the next step in the process of crafting a national telecommunications policy as we turn our attention to other sectors of the telecommunications industry."

Hearings to Supersede the Modification of Final Judgment Entered August 24, 1982, in the Antitrust Action Styled United States v. Western Electric, Civil Action No. 82-0192. United States District Court of the District of Columbia to Amend the Communications Act of 1934 To Regulate the Manufacturing of Bell Operating Companies, and for Other Purposes: Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance of the House Committee on Energy and Commerce, 103d Cong., 1st Sess. 117 (1993) (statement of Rep. Fields).

CMRS interconnection had it intended to rescind the Budget Act provisions and hand that jurisdiction back to the states. It did not do so.⁶

Indeed, Congress took steps to clarify that it did not intend to reinstate state jurisdiction over LEC-CMRS interconnection. In this regard, Congress added Section 251(i), which states as follows:

“Savings Provision -- nothing in this section shall be construed to limit or otherwise affect the Commission’s authority under Section 201.”

As explained above, the scope of the Commission's authority under Section 201, as expanded by the revisions of Section 332 and 2(b) in the Budget Act, vested the Commission with exclusive authority over both interstate and intrastate CMRS interconnection matters. By adding the Section 251(i) savings provision, Congress preserved the Commission's preexisting authority in this area.

⁶ It is noteworthy that Congress did expressly modify the regulatory scheme for CMRS adopted in the Budget Act where necessary to achieve its objectives. For example, the Commission’s forbearance authority under Section 332(c)(1)(A) was expanded pursuant to new Section 401(a).

CMRS REQUEST FOR INTERIM RELIEF

Several of the wireless companies and CTIA argue that immediate interim relief is necessary for the wireless carriers. They point out that existing interconnection rates are well in excess of costs and that the LECs are in violation of Section 20.11(b)(1) of the Act which requires LEC's to pay "reasonable compensation" to CMRS providers for LEC originating traffic terminated by the CMRS provider. In addition, they maintain that absent interim relief the LECs will continue to avoid their interconnection obligations and maintain excessive rates during the time period it takes to negotiate new agreements.

AirTouch further points out that if the FCC were to apply the Section 252 negotiation process to CMRS providers, similar delays would result during the "voluntary" negotiation period. It states that the Section 252 process allows the LECs to enter into agreements "without regard to the standards set forth in subsections (b) and (c) of Section 251." Those subsections include the requirements for reciprocal compensation (Section 251(b)(5)) and good faith negotiation (Section 251(c)(2)). They conclude that during the 135-160 day "voluntary" negotiation period, the LECs are given broad latitude to avoid interconnection obligations that the FCC has already mandated.

AirTouch and others also argue that the delay does not end with the conclusion of the negotiation process because any agreement reached through negotiation or arbitration must be submitted for State approval (Section 252(e)(1)). The states are then given 90 days, another three months, to either approve or reject any agreement adopted pursuant to negotiation (See Section 252(e)(4)). Since the States are then given 90 days to either approve or reject any agreement adopted pursuant to negotiation (Section 252(e)(4)),

AirTouch claims the LECs can drag out the negotiation process for over five months and then enter into an agreement with the knowledge that State approval may not be forthcoming for an additional three months.

AirTouch also has concerns about delays that result if both parties are unable to reach agreement by the end of the voluntary negotiation period. At that point a telecommunications carrier may “petition a State commission to arbitrate any open issues.” Section 252(b)(1). LECs are then given twenty-five days in which to respond to any such petition (Section 252(b)(3)), and the states must render a decision “not later than 9 months after the date on which the local exchange carrier received the request under this section” (Section 252(b)(4)(C)). Agreements reached through the arbitration process must be rejected or approved by the State within 30 days (Section 252(e)(4)).

Lastly, AirTouch notes that even the nine-month deadline prescribed in Section 252(b)(4)(C) does not necessarily end the potential for delay. If a particular State does not carry out its responsibilities under this section, the FCC must preempt the State within 90 days of being notified of the problem and assume the State’s role. The FCC is then given an unspecified amount of time to resolve the dispute.

Because of the above concerns, AirTouch proposed an interim relief plan that would provide immediate rate relief for the CMRS industry. Under its proposal, the Commission would (1) immediately suspend all existing LEC-CMRS interconnection rates; (2) adopt “true-up” procedures whereby LECs and CMRS providers will be compensated for the interconnection services provided during the suspension period

based on the new, negotiated rate terms; and (3) set a permanent ceiling which would govern current and future negotiations between CMRS providers and LECs.

With regard to the suspension of existing rates in LEC-CMRS interconnection contracts, AirTouch argues the Commission possesses the authority to suspend such rates under the *Mobile-Sierra* doctrine, which enables an agency to modify the terms of contracts between two carriers where it determines that the terms of the existing contracts would “adversely affect the public interest.” *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (“Under the *Mobile-Sierra* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful... and to modify other provisions of private contracts when necessary to serve the public interest.”) It points out that the Commission recently exercised this power in the interconnection context when it ordered Tier 1 LECs to provide expanded interconnection for both special and switched access services. *See Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Report and Order, FCC Rcd 7369 (1992); Second Memorandum Opinion and Order and Order on Reconsideration, 8 FCC Rcd 7341 (1993); Second Report and Order, 8 FCC Rcd 7374 (1993); Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994). In that proceeding, the Commission implemented policies designed to foster competition for the provision of access services traditionally provided by LECs on a monopoly basis. An important component of the Commission’s plan was the adoption of a “fresh look” policy, which enabled customers

to terminate their long-term arrangements with LECs so that they could acquire the access services of a competitive provider.

AirTouch also cites to the decision in *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992), where the Commission allowed AT&T's grandfathered 800 customers to terminate service, without termination liability, within ninety days of the availability of 800 number portability.¹

In addition to suspending rates, AirTouch proposes the adoption of true-up procedures that would take place when reasonable rates are ultimately negotiated between a CMRS provider and the LEC. At that time, the LECs and CMRS providers would be paid the amount owed under the new rate, plus interest, for the interconnection services provided during the suspension period. The last part of the AirTouch proposal involves the adoption of a ceiling price to govern current and future LEC-CMRS interconnection negotiations.

We conclude that it is in the public interest to provide interim relief for the CMRS industry. The record demonstrates that LECs are in violation of the reciprocal compensation requirement set forth in Section 20.11(b)(1) of our rules and there is no evidence to suggest that this violation will be corrected absent Commission action. This is because the LECs clearly have the incentive and the ability to maintain for as long as possible the current inequitable interconnection rate scheme. We cannot allow existing

¹ See also *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991), in which the Commission, in order to allow competition to develop in the air-ground market, allowed airlines to terminate, at their option and without penalty, contracts entered into with the monopoly provider of such services.

rule violations to continue for another day, let alone for an additional six to nine months. Furthermore, the continuation of existing LEC-CMRS rates adversely affects the public interest by inhibiting the development of CMRS services that will compete with LEC services and effectively rewards the LECs for continued violation of an FCC rule. In contrast, by suspending existing rates we provide an incentive for the LECs to negotiate in good faith with the CMRS providers.

Therefore, consistent with our prior decision in *Expanded Interconnection with Local Telephone Company Facilities*, we suspend all existing rates in LEC-CMRS interconnection contracts. In order to ensure that all parties are made whole once a new interconnection rate is negotiated that is consistent with the pricing parameters set forth herein, we adopt true-up procedures as recommended by AirTouch. Specifically, all interconnection payments will be suspended during the negotiation process. Once a CMRS provider and a LEC conclude the negotiation process and a new rate has been approved, the rate is retroactive to the date of the adoption of this Order. At that time both parties will submit requests for payment based on the volume of traffic interconnected during the negotiation period. The payment requests will be supported by data records that identify the traffic volumes for which payment is requested. This will avoid any unjust enrichment, ensure that the negotiation process moves forward and prevent further violation of FCC rules.